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Purple Communications, Inc. and Communications Workers of America, AFL-CIO. Cases 21–CA–095151, 21–RC–091531, and 21–RC–091584

October 8, 2020

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND
MCFERRAN

On December 11, 2014, the National Labor Relations Board issued a Decision and Order Remanding, adopting a new standard for determining the lawfulness of an employer’s rule restricting employee use of a company’s email system and remanding to Administrative Law Judge Paul Bogas the issue of whether the Respondent violated Section 8(a)(1) of the Act by maintaining its Internet, Intranet, Voicemail, and Electronic Communication Policy (the Electronic Communication Policy). *Purple Communications, Inc.*, 361 NLRB 1050 (2014) (*Purple Communications I*).¹ Thereafter, on March 24, 2017, the Board issued a Supplemental Decision and Order affirming the judge’s conclusion that the Respondent violated Section 8(a)(1) by maintaining its Electronic Communication Policy. *Purple Communications, Inc.*, 365 NLRB No. 50 (2017) (*Purple Communications II*).

On April 3, 2017, the Respondent filed a petition for review of both decisions in the United States Court of Appeals for the District of Columbia Circuit, and the Charging Party filed a petition for review of *Purple Communications II* in the United States Court of Appeals for the Ninth Circuit. On April 12, 2017, the U.S. Judicial Panel on Multidistrict Litigation randomly selected the Ninth Circuit as the court to review the case, and the D.C. Circuit transferred the Respondent’s petition for review to the Ninth Circuit. The Ninth Circuit consolidated the proceedings on April 26, 2017, and the General Counsel filed a cross-application for enforcement on May 3, 2017.

On February 27, 2020, the Ninth Circuit granted the General Counsel’s motion to remand *Purple Communications I* and *Purple Communications II* to the Board for reconsideration in light of the Board’s decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 368

NLRB No. 143 (2019). In *Caesars Entertainment*, the Board overruled *Purple Communications I* and announced a new standard that applies retroactively to all pending cases in which it is alleged that, as here, an employer violated the Act by maintaining rules restricting the use of its information-technology (IT) resources for nonwork purposes. *Id.*, slip op. at 1–9. The *Caesars Entertainment* standard states, in relevant part, that “an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.” *Id.*, slip op. at 8. Under this limited exception, employees are permitted to access their employer’s IT resources for nonbusiness use, even absent discrimination, where the employees would otherwise be deprived of any reasonable means of communicating with each other.

Because the parties did not previously have an opportunity to address whether this exception to the rule of *Caesars Entertainment* applies to the facts of this case, on June 22, 2020, the Board issued a notice to show cause why this case should not be remanded to the judge for further proceedings in light of *Caesars Entertainment*, including, if necessary, the filing of statements, reopening the record, and issuance of a second supplemental decision. The General Counsel, the Respondent, and the Charging Party filed responses to the Notice to Show Cause, and the Charging Party also filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

The General Counsel asserts that the case should be remanded to the judge for further processing, noting that the parties have not yet had an opportunity to address whether the *Caesars Entertainment* exception applies to the facts of this case. The General Counsel does not, however, offer further explanation in support of this position. The Respondent opposes remand, contending that the Electronic Communication Policy is squarely lawful under *Caesars Entertainment*. In addition, and without addressing the General Counsel’s argument for remand, the Respondent asserts that the Charging Party has not given any indication that it intends to argue that the narrow exception to *Caesars Entertainment* applies to this case. The Charging Party also opposes remand but argues that the Electronic Communication Policy is unlawful because it is not supported by legitimate business justifications.³

¹ In a prior decision, the Board severed and resolved all issues other than those implicating the Electronic Communication Policy. *Purple Communications, Inc.*, 361 NLRB 575 (2014).

² Member Emanuel took no part in the consideration or decision of this case. Therefore, the Charging Party’s motion to recuse Member Emanuel is denied as moot.

³ The Respondent and the Charging Party also cite a related case involving an allegation that the Respondent violated Sec. 8(a)(1) by continuing to maintain the Electronic Communication Policy. In *Purple Communications, Inc.*, 370 NLRB No. 26 (2020) (*Purple Communications III*), we dismissed that complaint allegation under *Caesars Entertainment*. We therefore grant the Charging Party’s request that the Board

The General Counsel's request for remand does not include any explanation of how a remand would address the narrow *Caesars Entertainment* exception in the circumstances of this case. We therefore agree with the Respondent and the Charging Party that further proceedings before the judge would serve no purpose.⁴

On the merits, there is no indication in the record that the Respondent's employees do not have access to other reasonable means of communication, and no party contends in its response to the show-cause notice that the Respondent's email system furnishes the only reasonable means for employees to communicate with one another. Therefore, we find that the Respondent did not violate Section 8(a)(1) by maintaining the Electronic Communication Policy.⁵ See *Purple Communications III*, 370 NLRB No. 26, slip op. at 3–4 (same); see also *Cellco Partnership d/b/a Verizon Wireless*, 369 NLRB No. 131, slip op. at 1 (2020); *Cellco Partnership d/b/a Verizon Wireless*, 369 NLRB No. 130, slip op. at 1 (2020).

take administrative notice of *Purple Communications III* but deny as moot its request to consolidate the proceedings.

⁴ The Charging Party's contention that the Respondent lacks legitimate business justifications for the Electronic Communication Policy is misplaced. In *Caesars Entertainment*, the Board balanced employees' NLRA rights and employers' interests to establish generally that employers may lawfully restrict employees' nonbusiness use of their IT systems, unless the restriction is discriminatory or employees have no other

ORDER

The remaining complaint allegation is dismissed.

Dated, Washington, D.C. October 8, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

Lauren McFerran, Member

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reasonable means of communicating with each other. The Board does not conduct this balance anew in each case.

⁵ Member McFerran acknowledges that *Caesars Entertainment*, above, is currently governing law, but adheres to and reiterates her dissent in that case. Contrary to her colleagues, she would apply *Purple Communications I* and find that the Respondent violated Sec. 8(a)(1) by maintaining the Electronic Communication Policy. See *Purple Communications III*, 370 NLRB No. 26, slip op. at 3–4 fn. 12 (Member McFerran, dissenting).